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July 2, 1993

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Implementation of the Cable Television Consumer
Protection and Competition Act of 1992 -- MM
Docket No. ~~92-266~~

Dear Mr. Caton:

I enclose an original and nine (9) copies of the Reply

JUL - 2 1993

Before the Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Washington, D.C. 20554

In the Matter of
Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992

Rate Regulation

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MM Docket No. 92-266

To: The Commission

Comments of Counsel To The Municipal Franchising Authorities

(Duncan, Weinberg, Miller, & Pembroke, P.C.)

Introduction and Summary

The Federal Communication Commission's proposal, in its Report and Order and Further Notice of Proposed Rulemaking, MM Docket 92-266, adopted April 1, 1993, to exclude the rates of cable systems with less than thirty percent penetration ("below 30 systems") in its calculation of a rate benchmark is in accordance with The Cable Television Consumer Protection and Competition Act of 1992 (the "Act") and well within the Commission's authority; the language of the Act does not state nor indicate anything to the contrary. Moreover, this conclusion is in agreement with its stated purpose and does not conflict with established principles of statutory construction. Comments by cable operators and associations to the contrary are flawed and misleading. Many of the comments have incorrectly identified the issue at hand and are based upon the perpetuation of monopolies and the hoarding of monetary resources.

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249

clearly defined by Congress, ACLU, 823 F.2d at 1567, but this has little to do with the Commission's proposal in the instant case. National, as well as Viacom,^{5/} Arizona,^{6/} Time-Warner,^{7/} and Tele-Communications, Inc.,^{8/} all misstate the issue in this manner and this is a fundamental flaw these parties' comments have in common. Rather, the proper statement of the issue is

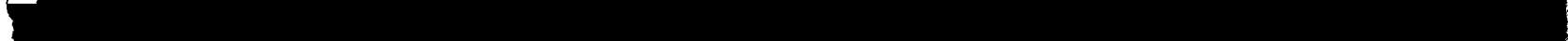




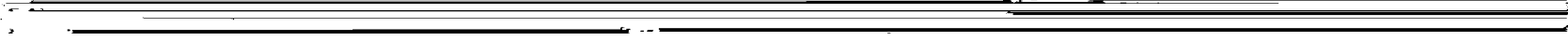



Do the words "consider" and "take into account,"
compel the inclusion of the rates of the below 30
systems in the benchmark calculation?

The Commission is not required to include these rates in the benchmark. "Consider" and "take into account" are not words of exacting specificity, but rather ones of discretion. They make no requirement, or even suggestion, that the Commission is *compelled* to include such rates in its calculation. The U.S. Court of Appeals for the District of Columbia has repeatedly held that, when an agency is required to "take into account" certain factors, "it need merely reach an express and considered conclusion about the bearing of each factor, but need not give any specific weight to a particular factor." Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 516 (D.C. Cir., 1983) (quoting Weyerhaeuser

Further, they fail to recognize Congress' intent to foster competition in the cable industry, encourage diversity and the expansion of services, and ensure that cable systems are responsive to the needs and interests of the particular local community(ies).

The Language of the Act Allows the Commission to Examine and Consider the Rates of Below 30 Systems Without Being Required to Include These Rates in the Calculation of the Benchmark

the agency informs itself about the matters that were specified by Congress, it can dismiss any enumerated factor if it does not consider it significant. BASF Wyandotte Corp v. Costle, 598 F.2d 637, 662, 663 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980). (See the Joint Comments of Bell Atlantic, GTE, and The NYNEX Telephone Companies, MM Docket 92-266, page 12). If indeed the Commission chooses to exclude the rates of the systems after examination and analyses, it will have fulfilled its statutory duty. This cannot be overestimated since the Commission's supposed



of programming upon subscribers.^{11/} This impending doom simply does not exist nor will it come to pass.

The assertion that the exclusion of the below 30 systems would result in too small a sample and yield too unreliable a result is incorrect. The sample size the Commission proposes to use is significant and in essence represents the total number of such systems it was able to identify at the time of the survey.^{12/} Simply including the rates of the below 30 systems, which are often quite high and not reflective of competition, but rather other factors that cause higher overall rates, would skew the sample, not increase its validity.^{13/} Additional published studies that examined the rate differential between competitive and noncompetitive systems support the Commission's findings.^{14/}

^{11/} Comments of Arizona Cable Television upon the Further Notice of Proposed Rulemaking, MM Docket 92-266, June 17, 1993, page 12-

The Rates of Below 30 Systems May be High Due to Factors Other Than Competition

The low penetration of cable systems does not necessarily result from the presence of other forms of low priced competition; in the instant case the inclusion of the below 30 systems would very significantly skew the benchmark upwards. Consequently, including these rates defeats the purpose of establishing a competitive benchmark, because it serves to dilute the actual price differential between competitive and monopoly markets.^{15/}

Factors that contribute to low penetration are primarily high priced service, incomplete cable plant, and low community demand for cable.^{16/} The location and the corresponding demographics of these low penetration systems are also critical. Many of the areas in which they are located are unusually poor or the population in the service area is elderly (since the best cable markets are those populated by families with children, areas with a large elderly population are likely to have low penetration).^{17/} Other

14/ (...continued)
June 28, 1993.

According to the Commission's survey the rate differential between competitive and noncompetitive systems is approximately 18 percent: If the below 30 systems are included in the benchmark, it will be at 10 percent; if they are excluded, it will be at 28 percent. Comments of Continental Cablevision, MM Docket 92-266, June 17, 1993, page 1.

15/ Thomas W. Hazlett, Affidavit, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation MM Docket 92-266 pages

determinants include seasonal fluctuations in population (i.e. part time residents), a large non-English speaking population, as well as unreliable signal quality, substandard customer service and an unappetizing programming menu.^{18/} Low penetration, thus, may not be indicative of competition or the potential for competition.

Several commentators, nevertheless, have predicted gloom and doom if the competitive benchmark is established; this is simply untrue and merely represents monopoly interests trying desperately to maintain their grasp upon subscribers in the face of public outcry. Viacom,^{19/} Colony Communications,^{20/} Time Warner,^{21/} Tele-Communications, Inc.,^{22/} and others, all begin their comments by asserting the Commission has no legal authority to exclude the low penetration systems; ultimately, however, each discusses and/or concludes by predicting massive revenue losses for the industry.

Quite clearly, if the Commission establishes a competitive benchmark, rates will, for most cable systems, decrease. Cable operators, however, would be permitted to recover all of their costs and a reasonable rate of return on investment under a cost-of-service approach. There have been similar concerns by small

18/ Id.

19/ Comments of Viacom, Inc., MM Docket No. 92-266, June 17, 1993, page 2.

20/ Comments of Colony Communications, MM Docket 92-266, June 17, 1993, page 4.

21/ Comments of Time Warner, MM Docket 92-266, page 4.

22/ Comments of Tele-Communications, Inc., MM Docket No. 92-266, page 4.

cable systems such as Cable Services of North Dakota.^{23/} Although it did not specifically address the legal issue of whether the Commission can exclude the below 30 systems, the executive officer expressed great concern that a significant lowering of the benchmark could severely damage the companies' ability to conduct business.^{24/} The Act specifically recognizes an exception for small

The Senator named 5 counties in his state and their cable systems' corresponding rate hikes:

The average increase for slightly less than a two year period

**A Competitive Benchmark Will Not Force the Industry to Cease
Research and Development and Expansion of Services**

Arizona Cable Television, among others, also expressed great
concern in its comments that the incentive to improve service.

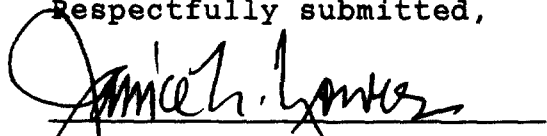
us, however, that monopolies result in allocative inefficiencies. Since there is no competition, a monopoly may be careless about its cost controls and resources may be wasted.^{34/} Such theory has been played out in the cable industry. A competitive benchmark, especially a meaningful one, which here would involve the elimination of the below 30 systems, can help to alleviate this burden the industry has placed upon consumers.

Conclusion

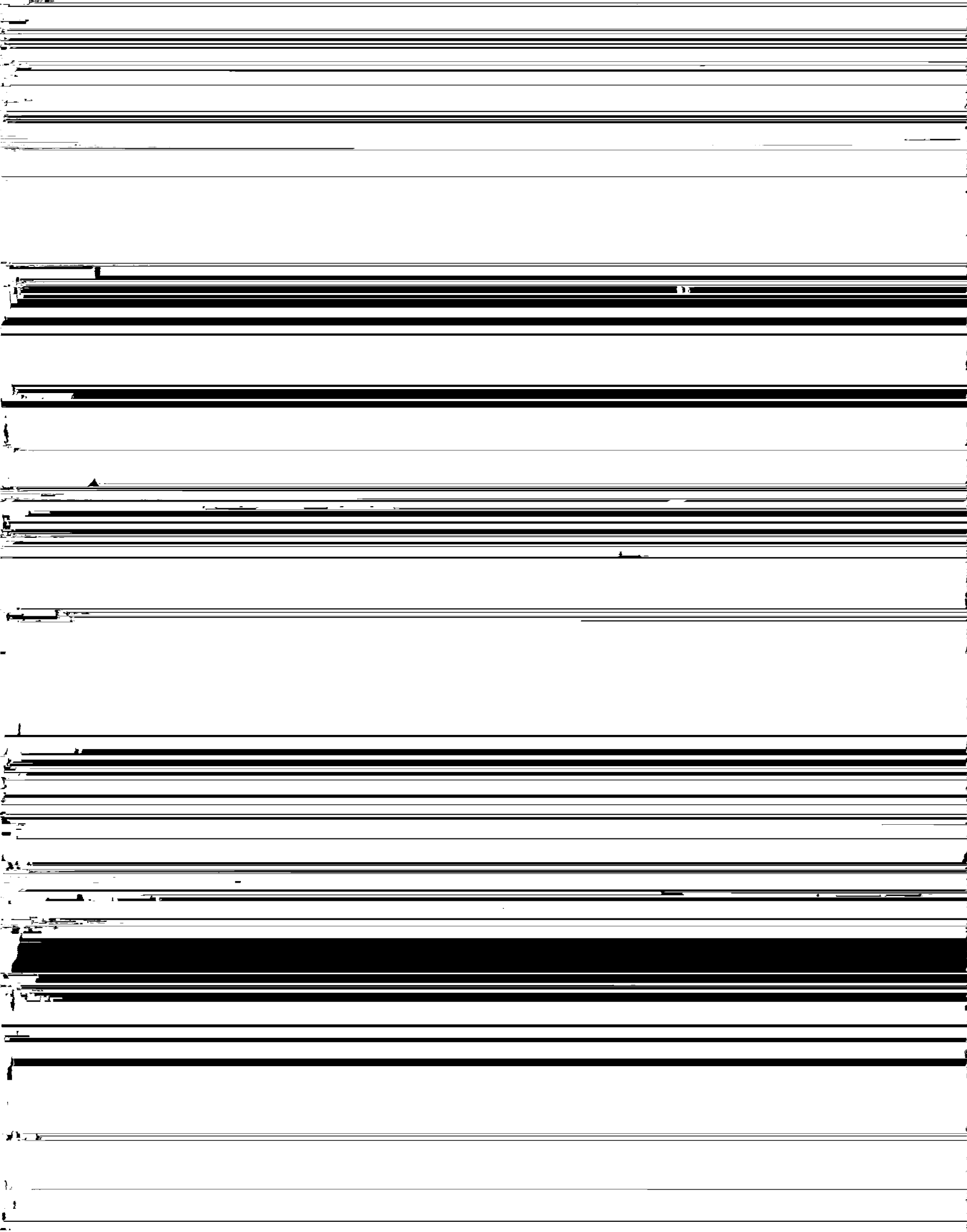
The Commission may and should lawfully exclude the rates of below 30 systems in its calculation of a competitively based rate benchmark.

Dated July 2, 1993

Respectfully submitted,


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^{34/} Economics, Third Edition, Wonnagitt, Paul, and Wonnagitt, Ronald, McGraw-Hill Book Company, New York, 1986, pages 516, 523.



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